

**PRESERVING THE RULE OF LAW IN AMERICA'S
JAILS AND PRISONS: THE CASE FOR AMENDING THE
PRISON LITIGATION REFORM ACT***

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Prisons and jails pose a significant challenge to the rule of law within American boundaries. As a nation, we are committed to constitutional regulation of governmental treatment of even those who have broken society's rules. And accordingly, most of our prisons and jails are run by committed professionals who care about prisoner welfare and constitutional compliance. At the same time, for prisons—closed institutions holding an ever-growing disempowered population¹—most of the methods by which we, as a polity, foster government accountability and equality among citizens are unavailable or at least not currently practiced. In the absence of other levers

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This Article adapts Professor Schlanger's testimony before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security in November of 2007 and an American Constitution Society Issue Brief that Professors Schlanger and Shay co-authored in March of 2007. See *Review of the Prison Litigation Reform Act: A Decade of Reform or an Increase in Prison and Abuses?: Hearing on H.R. 1889 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Margo Schlanger, Professor of Law, Washington University in St. Louis, on behalf of the American Bar Association), available at http://judiciary.house.gov/hearings/hear_110807.html; MARGO SCHLANGER & GIOVANNA SHAY, AM. CONSTITUTION SOC'Y FOR LAW AND POLICY, PRESERVING THE RULE OF LAW IN AMERICA'S PRISONS: THE CASE FOR AMENDING THE PRISON LITIGATION REFORM ACT (2007), available at <http://www.acslaw.org/node/4587>. The authors thank John Boston for his comments, and dedicate this Article to the memory of Rachel King, whose work on behalf of prisoners was untimely ended in 2008.

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¹ Bureau of Justice Statistics, U.S. Dep't of Justice, Key Facts at a Glance: Correctional Populations, <http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm> (last visited Nov. 5, 2008) (reporting 1.6 million inmates in American jails and prisons in 1995; by 2006, that number had increased by 42%, to 2.3 million). For a recent assessment, see PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 (2008), available at [http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100\(3\).pdf](http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100(3).pdf).

by which these ordinary norms can be encouraged, lawsuits, which bring judicial scrutiny behind bars, and which promote or even compel constitutional compliance, accordingly take on an outsize importance. Unfortunately, over the past twelve years, it has become apparent that a number of provisions of the Prison Litigation Reform Act ("PLRA")² cast shadows of constitutional immunity, contravening our core commitment to constitutional governance. The PLRA's obstacles to meritorious lawsuits are undermining the rule of law in our prisons and jails, granting the government near-impunity to violate the rights of prisoners without fear of consequences.

This damage to the rule of law in America's prisons is occurring even as those prisons have grown in their importance—both because of the nation's increasing incarcerated population (the world's largest)³ and the sharpening international focus on American treatment of prisoners, both domestically and abroad.⁴ Amendment is urgently needed. In recent months numerous advocates and organizations have urged reform.⁵ Indeed, a bill offered in the last Congress, the

2 Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.). The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 that ended the 1996 federal government budget standoff.

3 Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1 (reporting that the United States has the most prisoners of any nation in the world, including China); see also International Centre for Prison Studies, King's College London, World Prison Brief, http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poptotal (last visited Nov. 5, 2008); ROY WALMSLEY, BRIT. HOME OFFICE, WORLD PRISON POPULATION LIST (5th ed. 2003), available at <http://www.homeoffice.gov.uk/rds/pdfs2/r234.pdf>.

4 See Bob Herbert, Op-Ed., *America's Abu Ghraibs*, N.Y. TIMES, May 31, 2004, at A17 (drawing a connection between callous attitude towards domestic prisoners fostered by the PLRA and abuse of detainees in Abu Ghraib); see also *Prison Abuse Remedies Act of 2007: Hearing on H.R. 4109 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. (2008) [hereinafter *Hearing*] (statement of David Fathi, U.S. Program Director of Human Rights Watch), available at <http://hrw.org/english/docs/2008/04/22/usdom18610.htm> (explaining how the PLRA violates U.S. treaty obligations).

5 See, e.g., AMERICAN BAR ASSOCIATION, RESOLUTION 102B (2007), available at <http://www.abanet.org/leadership/2007/midyear/docs/SUMMARYOFRECOMMENDATIONS/hundredtwob.doc>; COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 84–87 (2006), available at <http://prisoncommission.org/report.asp>; Letter from the Nat'l Prison Rape Elimination Comm'n to Cong. Bobby Scott and Cong. Randy Forbes, Chair and Ranking Minority Members, Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary (Jan. 24, 2008) (on file with authors) [hereinafter Letter from the Nat'l Prison Rape Elimination Comm'n]. Other statements are available at <http://www.aclu.org/prison/restrict/32803res20071115.html> and at <http://savecoalition.org/latestdev.html>. See also *Hearing*, *supra* note 4, available at http://www.judiciary.house.gov/hearings/hear_042208.html.

Prison Abuse Remedies Act,⁶ would offer some moderate fixes to the most pressing problems created by the PLRA. In this Article, we discuss three of these problems. First, the PLRA's ban on awards of compensatory damages for "mental or emotional injury suffered while in custody without a prior showing of physical injury"⁷ has obstructed judicial remediation of religious discrimination, coerced sex, and other constitutional violations typically unaccompanied by physical injury, undermining the regulatory regime that is supposed to prevent such abuses. Second, the PLRA's provision barring federal lawsuits by prisoner plaintiffs who have failed to comply with their jails' or prisons' internal grievance procedures—no matter how difficult, futile, or dangerous such compliance might be for them—obstructs rather than promotes constitutional oversight of conditions of confinement. It strongly encourages prison and jail authorities to come up with ever-higher procedural hurdles in order to foreclose subsequent litigation. Third, the application of the PLRA's limitations to juveniles incarcerated in juvenile institutions has rendered those institutions largely immune from judicial oversight because so many young people are not able to follow the complex requirements imposed by the statute, and compliance by their parents or guardians on their behalf has been deemed legally insufficient. Each of these three problems disrupts accountability and enforcement of constitutional compliance.

Below, we discuss these issues in some depth. But it is important to mention in preface what we see as the primary salutary effect of the PLRA—its lightening of the burdens imposed on jail and prison officials by frivolous litigation. Pro se prisoner lawsuits in federal court are numerous, often lack legal merit, and pose real management challenges both for courts and for correctional authorities. Congress passed the PLRA in order to deal with this problem.⁸ This has in fact occurred, in two ways. First, the PLRA has drastically reduced the number of cases filed: prison and jail inmates filed twenty-six federal cases per thousand inmates in 1995; the most current statistic, for 2006, was less than eleven cases per thousand inmates, a decline of

⁶ Prison Abuse Remedies Act of 2007, H.R. 4109, 110th Cong., 1st Session (Nov. 7, 2007).

⁷ 42 U.S.C. § 1997e(e) (2006).

⁸ See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1555–1627 (2003) [hereinafter Schlanger, *Inmate Litigation*]; see also Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006) (discussing the PLRA's other purpose, to lessen court injunctive supervision of jails and prisons).

60%.⁹ So the PLRA has been extremely effective in keeping down the number of federal lawsuits by prisoners, even as incarcerated populations rise. Even more important than these sharply declining filing rates for understanding the decreasing burden of litigation for prison and jail officials are the statute's screening provisions,¹⁰ which require courts to dispose of legally insufficient prisoner civil rights cases without even notifying the sued officials of the suit against them and without receiving any response from those officials. Prison or jail officials no longer need to investigate or answer complaints that are frivolous or fail to state a claim under federal law.

But in addition to frivolous or legally insufficient lawsuits, there are, of course, serious cases brought by prisoners: cases involving life-threatening deliberate indifference by authorities to prisoner health and safety; sexual assaults; religious discrimination; retaliation against those who exercise their free speech rights; and so on. When the PLRA was passed, its supporters emphasized over and over: "[We] do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing inmates from abusing the Federal judicial system."¹¹ Yet "prevent[ing] inmates from raising legitimate claims" is precisely what the PLRA has done in many instances. If the PLRA were successfully "reduc[ing] the quantity and improv[ing] the quality of prisoner suits,"¹² as its supporters intended, one would expect the dramatic decline in filings to be accompanied by a concomitant increase in plaintiffs' success rates in the cases that remain. The evidence is quite the contrary. The shrunken inmate

9 For 2007 filing statistics, see ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2007, at 148 tbl.C-2A (2007) (prisoner civil rights, prison conditions cases), available at <http://www.uscourts.gov/judbus2007/appendices/C02ASep07.pdf>; for 1995 filing statistics, see ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1999, at 139 tbl.C-2A (1999), available at <http://www.uscourts.gov/judbus1999/c02asep99.pdf>; and for prison population figures, see Bureau of Justice Statistics, *supra* note 1.

10 28 U.S.C. § 1915A(a) (2006).

11 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("The crushing burden of these frivolous suits makes it difficult for the courts to consider meritorious claims."); *see also* 141 CONG. REC. S19,114 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl) ("If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners."); 141 CONG. REC. S18,136 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch); 141 CONG. REC. H1480 (daily ed. Feb. 9, 1995) (statement of Rep. Canady) ("These reasonable requirements will not impede meritorious claims by inmates but will greatly discourage claims that are without merit.").

12 *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

docket is less successful than before the PLRA's enactment; more cases are dismissed, and fewer settle.¹³ An important explanation is that constitutionally meritorious cases are now faced with new and often insurmountable obstacles. These obstacles are the topic of this Article.

I. PHYSICAL INJURY

The PLRA provides that inmate plaintiffs may not recover damages for “mental or emotional injury suffered while in custody without a prior showing of physical injury.”¹⁴ Given the commitment by the Act's supporters that constitutionally meritorious suits would not be constrained by its provisions, perhaps the purpose of this provision was the limited one of foreclosing tort actions claiming negligent or intentional infliction of emotional distress unless they resulted in physical injury, which might have otherwise been available to federal prisoners under the Federal Tort Claims Act.¹⁵ Such an attempt to limit what legislators may have considered to be frivolous or inconsequential claims¹⁶ would echo fairly common state law limitations on tort causes of action.¹⁷

Notwithstanding what may have been the limited intent underlying the physical injury requirement, its impact has been much more sweeping. First, many courts have held that the provision covers all violations of non-physical constitutional rights.¹⁸ Proven violations of

¹³ See Schlanger, *Inmate Litigation*, *supra* note 8, at 1644–64.

¹⁴ 42 U.S.C. § 1997e(e) (2006).

¹⁵ 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671–2680 (2006); see also *United States v. Muniz*, 374 U.S. 150 (1963) (allowing a Federal Tort Claims Act lawsuit by federal prisoners for personal injuries caused by the negligence of government employees).

¹⁶ See Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520 (1996).

¹⁷ See, e.g., Dale Joseph Gilsinger, Annotation, *Recovery Under State Law for Negligent Infliction of Emotional Distress Under Rule of Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968), or *Refinements Thereof*, 96 A.L.R.5TH 107 § 6 (2002) (citing cases from nine states).

¹⁸ See, e.g., *Koger v. Bryan*, 523 F.3d 789, 804 (7th Cir. 2008) (noting that RLUIPA claim is “limited” by PLRA physical injury requirement); *Royal v. Kautzky*, 375 F.3d 720, 722–23 (8th Cir. 2004) (concluding that no compensation is available for retaliation for exercise of free speech rights); *Thompson v. Carter*, 284 F.3d 411, 416–17 (2d Cir. 2002) (concluding that no compensation is available for violation of due process rights); *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001) (concluding that no compensation is available for violation of religious rights); *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) (concluding that no compensation is available for violation of religious rights); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (concluding that no compensation is available for violation of constitutional privacy rights). But see *Canell v.*

prisoners' religious rights, speech rights, and due process rights have all been held non-compensable, and thus placed largely beyond the scope of judicial oversight. For example, in *Searles v. Van Bebber*,¹⁹ the Tenth Circuit concluded that the physical injury requirement barred a suit by a Jewish prisoner who alleged a First Amendment violation based on his prison's refusal to give him kosher food. This result is particularly problematic in light of Congress's notable concern for prisoners' religious freedoms. The Religious Land Use and Institutionalized Persons Act ("RLUIPA"), passed in 2000, states that "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means."²⁰

Moreover, although the case law is far from uniform, some courts have deemed sexual assault not to constitute a "physical injury" within the meaning of the PLRA. In *Hancock v. Payne*,²¹ a number of male prisoners alleged that over several hours, a corrections officer sexually assaulted them. "Plaintiffs claim that they shared contraband with [the officer] and that he made sexual suggestions; fondled their genitalia; sexually battered them by sodomy, and committed other related assaults."²² The plaintiffs further complained that the officer "threatened Plaintiffs with lockdown or physical harm should the incident be reported."²³ The district court granted summary judgment in part to the defendants.²⁴ One of the grounds for this defense victory was the physical injury requirement.²⁵ The court said, "the plaintiffs do not make any claim of physical injury beyond the bare allegation of sexual assault."²⁶ In other words, in the view of this district court, not even coerced sodomy (which was alleged) constituted physical injury. Though some other courts have decided the question differently, the *Hancock* court is not alone in reaching this conclusion.²⁷ As with religious rights, this outcome exists in sharp ten-

Lightner, 143 F.3d 1210, 1214–15 (9th Cir. 1998) (stating that PLRA "does not preclude actions for violations of First Amendment rights").

19 251 F.3d at 872, 876.

20 42 U.S.C. § 2000cc-1(a)(1)–(2) (2006).

21 No. 1:03-CV-671, 2006 WL 21751 (S.D. Miss. Jan 4, 2006).

22 *Id.* at *1.

23 *Id.*

24 *Id.*

25 *Id.* at *3.

26 *Id.*

27 *See, e.g.,* Smith v. Shady, No. 3:05-CV-2663, 2006 WL 314514, at *2 (M.D. Pa. Feb. 9, 2006) ("Plaintiff's allegations in the complaint concerning Officer Shady grabbing his penis and

sion with Congress's recent efforts to eliminate sexual violence and coercion behind bars by passing the Prison Rape Elimination Act of 2003.²⁸

Finally, in case after case, courts have held even serious physical symptoms insufficient to allow the award of damages because of the PLRA's physical injury provision.²⁹ In one case, a plaintiff alleged that the defendant correctional officer "punch[ed the] Plaintiff repeatedly in his abdominal area, pushed Plaintiff's head down and repeatedly punched Plaintiff with his right hand in the back of his head, hit Plaintiff on his left ear, placed Plaintiff's head between his legs and grabbed Plaintiff around his waist and picked the Plaintiff up off the ground and dropped Plaintiff on his head."³⁰ The plaintiff further alleged that he "sustained bruises on [his] left ear, back of [his] head and swelling to the abdominal area of his body."³¹ Nonetheless, the district court held the claim insufficient under the PLRA's physical injury provision.³² In another, burns to the plaintiff's face were deemed insufficient because those burns had "healed well," leaving "no lasting effect."³³

Even when courts *reject* the defense that unconstitutional conduct did not cause a physical injury, the PLRA emboldens prison and jail officials to make objectionable arguments that must be litigated, forcing expenditure of resources and prolonging litigation, as well as further dehumanizing prisoners and promoting a culture of callous-

holding it in her hand do not constitute a physical injury or mental symptoms."). *But see* *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (holding that sexual assault constitutes physical injury within the meaning of the PLRA). *See generally* Deborah M. Golden, *It's Not All In My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37 (2004).

²⁸ 42 U.S.C. §§ 15601–15609 (2006).

²⁹ *See Jarriett v. Wilson*, 162 F. App'x 394, 396–98 (6th Cir. 2005) (concluding that inmate confined for twelve hours in "strip cage" in which he could not sit down did not suffer physical injury even though he testified that he had a "bad leg" that swelled "like a grapefruit" and that caused severe pain and cramps); *Myers v. Valdez*, No. 3:05-CV-1799, 2005 WL 3147869, at *2 (N.D. Tex. Nov. 17, 2005) (concluding that alleged "pain, numbness in extremities, loss of mobility, lack of sleep, extreme tension in neck and back, extreme rash and discomfort" did not satisfy PLRA physical injury requirement); *Mitchell v. Horn*, No. 2:98-CV-4742, 2005 WL 1060658, at *1 (E.D. Pa. May 5, 2005) (reported symptoms including "severe stomach aches, severe headaches, severe dehydration . . . and blurred vision," suffered by inmate confined in cell allegedly "smeared with human waste and infested with flies" did not constitute physical injury for PLRA purposes).

³⁰ *Borroto v. McDonald*, No. 5:04-CV-165, 2006 WL 2789152, at *2 (N.D. Fla. Sept. 26, 2006).

³¹ *Id.*

³² *Id.* at *1.

³³ *Brown v. Simmons*, No. 6:03-CV-122, 2007 WL 654920, at *6 (S.D. Tex. Feb. 23, 2007).

ness.³⁴ Moreover, experienced civil rights attorneys hesitate to file suits alleging many serious abuses (for example, on behalf of prisoners chained to their beds or subjected to sexual harassment by guards), because they know that corrections officials will argue—and often succeed in arguing—that compensatory damages are barred by the PLRA.³⁵

The point is that the PLRA's ban on awards of compensatory damages for "mental or emotional injury suffered while in custody without a prior showing of physical injury" has made it far more difficult for prisoners to enforce any non-physical rights—including freedom of religion and freedom of speech—and to seek compensation for any mental rather than physical harm, no matter how intentionally, even torturously, inflicted. (This aspect of the law has, in fact, convinced some courts to save the provision from constitutional infirmity by reading it not to bar relief.³⁶) The PLRA has left the availability of compensatory damages for the constitutional violation of coerced sex an open question. It has posed an obstacle to compensation even for physical violence, if the physical component of the injury is deemed insufficiently serious. It has thereby undermined the important norms that such infringements of prisoners' rights are unacceptable. Just as it contradicts constitutional commitments, the PLRA is simultaneously obstructing Congress's recent statutory efforts

34 See, e.g., *Pool v. Sebastian County*, 418 F.3d 934, 942–43, 943 n.2 (8th Cir. 2005) (describing the argument of the defendant jail officials that the stillbirth of a fetus of four to five months gestational age over a jail cell toilet, preceded by days of bleeding, did not satisfy PLRA physical injury requirement).

35 See *Hearing*, *supra* note 4, at 8 (statement of Stephen B. Bright, President and Senior Counsel, Southern Center for Human Rights), available at <http://www.judiciary.house.gov/hearings/pdf/Bright080422.pdf>.

36 See *Siggers-El v. Barlow*, 433 F. Supp. 2d 811 (E.D. Mich. 2006), concluding that the "jury was entitled to find that the Plaintiff suffered mental or emotional damages as a result of Defendant's violation of his First Amendment rights [because any] other interpretation of § 1997e(e) would be . . . unconstitutional," *id.* at 816, and noting:

The Court finds the following hypothetical, set forth in Plaintiff's brief, to be persuasive:

[I]magine a sadistic prison guard who tortures inmates by carrying out fake executions—holding an unloaded gun to a prisoner's head and pulling the trigger, or staging a mock execution in a nearby cell, with shots and screams, and a body bag being taken out (within earshot and sight of the target prisoner). The emotional harm could be catastrophic but would be non-compensable. On the other hand, if a guard intentionally pushed a prisoner without cause, and broke his finger, all emotional damages proximately caused by the incident would be permitted.

Id. (alteration in original). See also *Percival v. Rowley*, No. 1:02-CV-363, 2005 WL 2572034, at *2 (W.D. Mich. Oct. 12, 2005) ("To allow section 1997e(e) to effectively foreclose a prisoner's First Amendment action would put that section on shaky constitutional ground.").

to protect prisoners' religious liberty, as well as freedom from sexual abuse.

II. ADMINISTRATIVE EXHAUSTION

The PLRA's exhaustion provision states: "no action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."³⁷ The provision appears harmless enough. Who could object, after all, to a regime in which corrections officials are given the first opportunity to respond to and perhaps resolve prisoners' claims?

But in many jails and prisons, administrative remedies are, unfortunately, very difficult to access. Deadlines may be very short, for example, or the number of administrative appeals required may be very large.³⁸ The requisite form may be repeatedly unavailable,³⁹ or the grievance system may seem not to cover the complaint the prisoner seeks to make.⁴⁰ Prisoners often fear retaliation,⁴¹ and, although some courts have recognized exceptions to the exhaustion requirement based on estoppel or "special circumstances,"⁴² others have refused to excuse prisoners' lapses.⁴³ Beginning six years after the PLRA's en-

³⁷ 42 U.S.C. § 1997e(a) (2006).

³⁸ For a survey of prison and jail grievance policy deadlines, see Brief for Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae in Support of Respondent at 6–13 & A1–A7, *Woodford v. Ngo*, 548 U.S. 81 (2006) (No. 05-416), 2006 WL 304573 [hereinafter LSO Amicus Brief].

³⁹ See, e.g., *Latham v. Pate*, No. 1:06-CV-150, 2007 WL 171792, at *2 (W.D. Mich. Jan. 18, 2007) (dismissing suit due to tardy exhaustion in case in which the prisoner who alleged that he had been beaten maintained that he was placed in segregation and administrative segregation immediately following assault and that "officers did not provide him with the grievance forms").

⁴⁰ See, e.g., *Benfield v. Rushton*, No. 8:06-CV-2609, 2007 WL 30287, at *1 (D.S.C. Jan. 4, 2007) (dismissing suit due to untimely filing of grievance brought by prisoner who alleged that he was repeatedly raped by other inmates; prisoner had explained that he "didn't think rape was a grievable issue"); *Marshall v. Knight*, No. 3:03-CV-460, 2006 WL 3714713, at *1 (N.D. Ind. Dec. 14, 2006) (dismissing, for failure to exhaust, plaintiff's claim that prison officials retaliated against him in classification and disciplinary decisions, even though prison policy dictated that no grievance would be allowed to challenge classification and disciplinary decisions).

⁴¹ See *Woodford*, 548 U.S. at 118 & n.14 (Stevens, J., dissenting).

⁴² See *Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir. 2004).

⁴³ See, e.g., *Garcia v. Glover*, 197 F. App'x 866, 867 (11th Cir. 2006) (refusing to excuse non-exhaustion in case in which inmate alleged that he had been beaten by five guards, despite the fact that prisoner alleged that he feared he would be "killed or shipped out" if he filed an administrative grievance); *Umstead v. McKee*, No. 1:05-CV-263, 2005 WL

actment, first some of the Courts of Appeals,⁴⁴ and finally the Supreme Court,⁴⁵ held that the PLRA forever bars even meritorious claims from court if a prisoner has failed to comply with all of the many technical requirements of the prison or jail grievance system.

This means that if prisoners miss deadlines that are often less than fifteen days and in some jurisdictions as short as two to five days,⁴⁶ a judge cannot consider valid claims of sexual assault, beatings, or racial or religious discrimination. Moreover, the PLRA's exhaustion requirement has been held to grant constitutional immunity to prison officials based on understandable mistakes by pro se prisoners operating under rules that are often far from clear. Wardens and sheriffs routinely refuse to engage prisoners' grievances because those prisoners commit minor technical errors, such as using the incorrect form,⁴⁷ sending the right documentation to the wrong official,⁴⁸ or failing to file separate forms for each issue, even if the interpretation of a single complaint as raising two separate issues is the prison administration's.⁴⁹ Each such misstep by a prisoner bars consideration of even an otherwise meritorious civil rights action.⁵⁰ Although dismissals are often without prejudice, prison grievance deadlines are so short that prisoners who failed to exhaust before filing suit generally are unable return to court.⁵¹

1189605, at *2 (W.D. Mich. May 19, 2005) ("[I]t is highly questionable whether threats of retaliation could in any circumstances excuse the failure to exhaust administrative remedies.").

44 See *Pozo v. McCaughtry*, 286 F.3d 1022, 1023 (7th Cir. 2002).

45 *Woodford*, 548 U.S. 81.

46 *Id.* at 118 (Stevens, J., dissenting) ("[T]ime requirements . . . are generally no more than 15 days, and . . . , in nine States, are between 2 and 5 days."); see also LSO Amicus Brief, *supra* note 38.

47 See, e.g., *Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001).

48 See, e.g., *Keys v. Craig*, 160 F. App'x 125 (3d Cir. 2005).

49 *Harper v. Laufenberg*, No. 3:04-CV-699, 2005 WL 79009, at *3 (W.D. Wis. Jan. 6, 2005).

50 See Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 321 (2007) ("In a survey of reported cases citing *Woodford* in the first seven months after it was decided, the majority [of cases in which the exhaustion issue was resolved] were dismissed entirely for failure to exhaust. All claims raised in the complaint survived the exhaustion analysis in fewer than fifteen percent of reported cases." (footnotes omitted)).

51 See, e.g., *Rohn v. Beard*, No. 2:07-CV-783, 2007 WL 4454417, at *1 (W.D. Pa. 2007) (dismissing case because prisoner had filed an untimely grievance after his case was initially dismissed for incomplete exhaustion); *Regan v. Frank*, No. 06-CV-66, 2007 WL 106537 at *5 (D. Haw. 2007) ("Even though [the court] dismissed Plaintiff's claims without prejudice to the filing of a new action following proper exhaustion, *Ngo* makes proper exhaustion of these claims impossible.").

For this reason, the National Prison Rape Elimination Commission, a bipartisan commission appointed under the Prison Rape Elimination Act of 2003,⁵² has warned that the PLRA exhaustion requirement can “frustrate Congress’s goal of eliminating sexual abuse in U.S. prisons, jails, and detention centers.”⁵³ The Commission wrote to the House Judiciary Committee that “[b]ecause of the emotional trauma and fear of retaliation or repeated abuse that many incarcerated rape victims experience, as well as the lack of confidentiality in many administrative grievance procedures, many victims find it extremely difficult—if not impossible—to meet the short timetables of administrative procedures.”⁵⁴ To solve this problem, the Commission has proposed (in a working draft of regulatory standards) that “Any report of sexual abuse made at any time after the abuse, which names a perpetrator and is made in writing to the agency, satisfies the exhaustion requirement of the Prison Litigation Reform Act.”⁵⁵

Far from encouraging correctional officials to handle the sometimes frivolous but sometimes extremely serious complaints of inmates, the PLRA’s exhaustion rule actually provides an incentive to administrators in the state and federal prison systems and the over 3,000 county and city jail systems to fashion ever higher procedural hurdles in their grievance processes. After all, the more onerous the grievance rules, the less likely a prison or jail, or staff members, will have to pay damages or be subjected to an injunction in a subsequent lawsuit.⁵⁶ In fact, even when prison and jail administrators *want* to re-

⁵² 42 U.S.C. §§ 15601–15609 (2006).

⁵³ Letter from the Nat’l Prison Rape Elimination Comm’n, *supra* note 5.

⁵⁴ *Id.*

⁵⁵ National Prison Rape Elimination Commission, [Draft] Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails 33 (2008), http://www.nprec.us/UpcomingEvents/5.1_MasterAdultPrison_andJail_andImmigrationStandardsClean.pdf. At the time this Article went to press, this draft standard had not yet been submitted to the U.S. Attorney General for approval as a final rule. See National Prison Rape Elimination Commission, Standards and Comments, <http://www.nprec.us/standards.htm> (last visited Nov. 5, 2008).

⁵⁶ There is evidence that prisons and jails have headed in this direction. For example, in July 2002, in *Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002), the Seventh Circuit reversed the district court’s dismissal of a case for failure to exhaust; in rejecting the defendants’ argument that the plaintiff’s grievances were insufficiently specific, the court noted that the Illinois prison grievance rules were silent as to the requisite level of specificity. Less than six months later, the Illinois Department of Corrections proposed new regulations that provided:

The grievance shall contain factual details regarding each aspect of the offender’s complaint including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint.

solve a complaint on its merits, the PLRA discourages them from doing so, and therefore actually undermines the very interest in self-governance Congress intended to serve.⁵⁷ Can anyone reasonably expect a governmental agency to resist this kind of incentive to avoid merits consideration of grievances? The officials in question are a varied group—elected jailers and sheriffs, appointed jail superintendents, professional wardens, politically appointed commissioners. What they all have in common is an understandable interest in avoiding adverse judgments against themselves or their colleagues.

Thus, by cutting off judicial review based on an inmate's failure to comply with his prison's own internal, administrative rules—regardless of the merits of the claim—the PLRA exhaustion requirement undermines external accountability. Still more perversely, it actually undermines internal accountability, as well, by encouraging prisons to come up with high procedural hurdles, and to refuse to consider the merits of serious grievances, in order to best preserve a defense of non-exhaustion.

Moreover, courts have generally ignored Justice Breyer's suggestion in his *Woodford v. Ngo* concurrence that "well established exceptions to exhaustion" from administrative law and habeas corpus doctrine⁵⁸ be implemented in the PLRA context. Under ordinary administrative law, exhaustion is not required where it would be futile⁵⁹—for example, if an aggrieved party seeks damages in a case where no other kind of relief is applicable, but the administrative process is not empowered to award damages. But the Supreme Court has held that the PLRA forecloses a futility exception to its exhaustion requirement.⁶⁰ Likewise, ordinary administrative law waives exhaustion requirements where delay in judicial review imposes a hardship on the plaintiff.⁶¹ But most courts have held that the PLRA allows no emergency exception from the exhaustion requirement. As one court put it, "The PLRA does not excuse exhaustion for prisoners who are under imminent danger of serious physical injury, much

ILL. ADMIN. CODE tit. 20, § 504.810(b) (2008); see 26 Ill. Reg. 18065, at § 504.810(b) (Dec. 27, 2002) (proposing amendment).

⁵⁷ In fact, if an agency chooses to entertain an untimely grievance that merits examination, the agency is barred from asserting a failure-to-exhaust defense at later time. *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004).

⁵⁸ *Woodford v. Ngo*, 548 U.S. 81, 103–04 (2006) (Breyer, J., concurring).

⁵⁹ *Honig v. Doe*, 484 U.S. 305, 326–27 (1988); *Weinberger v. Salfi*, 422 U.S. 749 (1975).

⁶⁰ *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001) (rejecting futility and other exceptions for the PLRA).

⁶¹ See, e.g., *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967) (noting that determination of ripeness requires a consideration of the "hardship to the parties").

less for those who are afraid to confront their oppressors.”⁶² A requirement of administrative exhaustion that punishes failure to cross every *t* and dot every *i* by conferring constitutional immunity for civil rights violations, and allows no exceptions for emergencies, is simply unsuited for the circumstances of prisons and jails, where physical harm looms so large and prisoners are so ill-equipped to comply with legalistic rules.

Ideally, grievance systems actually improve agency responsiveness and performance by helping corrections officials to identify and track complaints and to resolve problems.⁶³ Good grievance systems can indeed reduce litigation by solving prisoners’ problems.⁶⁴ But the PLRA’s grievance provision instead encourages prison and jail officials to use their grievance systems in another way—not to solve problems, but to immunize themselves from future liability. Judicial oversight of prisoners’ civil rights is essential to minimize violations of those rights, but the PLRA’s exhaustion provision arbitrarily places constitutional violations beyond the purview of the courts.

It would be relatively simple to achieve the legitimate goal of allowing prison and jail authorities the first chance to solve their own problems, yet to avoid the kinds of problems the PLRA has introduced. The exhaustion provision should not be eliminated, but rather amended to require that prisoners’ claims be presented in

⁶² *Broom v. Rubitschun*, No. 1:06-CV-350, 2006 WL 3344997, at *4 (W.D. Mich. Nov. 17, 2006); *see also, e.g., Williams v. CDCR*, No. 2:06-CV-1373, 2007 WL 2384510, at *4 (E.D. Cal. Aug. 17, 2007) (“The presence of exigent circumstances does not relieve a plaintiff from fulfilling this requirement.”), *report and recommendation adopted*, 2007 WL 2793117 (E.D. Cal. Sept. 26, 2007); *Ford v. Smith*, No. 1:06-CV-710, 2007 WL 1192298, at *2 (E.D. Tex. Apr. 23, 2007) (dismissing where plaintiff said his safety was in danger and he sought a continuance until exhaustion was completed); *Rendelman v. Galley*, No. 1:06-CV-1999, 2007 WL 2900460, at *2 (D. Md. Feb. 15, 2007) (dismissing despite plaintiff’s claim of imminent danger and request for a “protective order” pending exhaustion), *aff’d*, 230 F. App’x 314 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 378 (2007); *Aburomi v. United States*, No. 1:06-CV-3682, 2006 WL 2990362, at *1 (D.N.J. Oct. 17, 2006) (“It is understandable that Plaintiff would want immediate treatment for a perceived recurrence of cancer, but the administrative remedy program is mandatory regardless of the nature of the relief sought.”).

⁶³ *See* LYNN S. BRANHAM ET AL., AM. BAR ASSOC. CRIMINAL JUSTICE SECTION, LIMITING THE BURDENS OF PRO SE INMATE LITIGATION: A TECHNICAL-ASSISTANCE MANUAL FOR COURTS, CORRECTIONAL OFFICIALS, AND ATTORNEYS GENERAL (1997).

⁶⁴ Dora Schriro, *Correcting Corrections: Missouri’s Parallel Universe*, in SENTENCING AND CORRECTIONS: ISSUES FOR THE 21ST CENTURY (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181414.pdf>; Dora Schriro, Director of the Ariz. Dep’t of Corrections, *Correcting Corrections: The Arizona Plan: Creating Conditions for Positive Change in Corrections*, Statement Before the Commission on Safety and Abuse in America’s Prisons (Feb. 9, 2006), available at http://www.prisoncommission.org/statements/schriro_dora.pdf.

some reasonable form to corrections officials prior to adjudication, even if that presentment occurs after the prisons' grievance deadline. Cases filed with claims that have not been presented to prison officials could be stayed for a limited period of time, to allow corrections officials an opportunity to address them administratively.

III. COVERAGE OF JUVENILES

The PLRA applies by its plain terms to juveniles and juvenile facilities.⁶⁵ But prisoners under age eighteen were not the sources of the problems the PLRA was intended to solve. Even before the PLRA, juveniles accounted for very little prisoner litigation.⁶⁶ This dearth of litigation is not surprising. As the recent investigation into alleged sexual abuse in the Texas juvenile system demonstrates, although incarcerated youth are highly vulnerable to exploitation,⁶⁷ they generally are not in a position to assert their legal rights.⁶⁸ Juvenile detainees are young, often undereducated, and have very high rates of psychiatric disorders.⁶⁹ Moreover, youth incarcerated in juvenile facilities generally do not have access to law libraries or other sources of information about the law that might enable them to sue more often. One court has even observed, "[a]s a practical matter,

⁶⁵ 18 U.S.C. § 3626(g)(5) (2006) ("[T]he term 'prison' means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law.").

⁶⁶ Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. REV. 675, 681 (1998) (reporting that as of 1998, "[t]here [were] less than a dozen reported opinions directly involving challenges to conditions in juvenile detention centers").

⁶⁷ Ralph Blumenthal, *Investigations Multiplying in Juvenile Abuse Scandal*, N.Y. TIMES, Mar. 4, 2007, at A24; Ralph Blumenthal, *One Account of Abuse and Fear in Texas Youth Detention*, N.Y. TIMES, Mar. 8, 2007, at A19; see also HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, CUSTODY AND CONTROL: CONDITIONS OF CONFINEMENT IN NEW YORK'S JUVENILE PRISONS FOR GIRLS (2006), available at <http://hrw.org/reports/2006/us0906/us0906webwcover.pdf> (detailing abuse in the New York girls' juvenile prisons).

⁶⁸ See Staci Semrad, *Texas Ranger Tells of Prosecutor's "Lack of Interest"*, N.Y. TIMES, Mar. 9, 2007, at A20, describing a sergeant in the Texas Rangers who investigated abuses at the West Texas State School in Pyote, and told a legislative committee that he "saw kids with fear in their eyes—kids who knew they were trapped in an institution that would never respond to their cries for help." The sergeant said he was unable to convince a local prosecutor to take action.

⁶⁹ LOURDES M. ROSADO & RIYA S. SHAH, PROTECTING YOUTH FROM SELF-INCRIMINATION WHEN UNDERGOING SCREENING, ASSESSMENT AND TREATMENT WITHIN THE JUVENILE JUSTICE SYSTEM 5 (2007), available at <http://jlc.org/files/publications/protectingyouth.pdf> ("[S]ome large scale studies suggest that as many as 65%-75% of the youth involved in the juvenile justice system have one or more diagnosable psychiatric disorders.").

juveniles between the ages of twelve and nineteen, who, on average, are three years behind their expected grade level, would not benefit in any significant respect from a law library, and the provision of such would be a foolish expenditure of funds.”⁷⁰

As with unincarcerated children, when juveniles do bring lawsuits, or otherwise seek to remedy any problems they face behind bars, it is very often their parents or other caretaking adults who take the lead. It is, after all, parents’ ordinary role to try to protect their children. But the PLRA’s exhaustion provision stymies such parental efforts, instead holding incarcerated youth to an impossibly high standard of self-reliance. The case of *Minix v. Pazera*⁷¹ is a leading example of the result. In *Minix*, a young man, S.Z., and his mother, Cathy Minix, filed a civil rights suit for abuse that S.Z. endured while incarcerated as a minor in 2002 and 2003 in Indiana juvenile facilities. While in custody, S.Z. was repeatedly beaten, once with “padlock-laden socks.”⁷² After one beating, he suffered a seizure, but no one helped him, and he was beaten again the next day.⁷³ He was raped and witnessed another child being sexually assaulted.⁷⁴ S.Z. was afraid to report the assaults to staff—and his fear was natural enough in light of the fact that some of the staff were involved in arranging fights between juveniles, or would even “handcuff one juvenile so other juvenile detainees could beat him.”⁷⁵

Although S.Z. feared retaliation, Mrs. Minix made what the district court termed “heroic efforts to protect her son.”⁷⁶ She spoke with staff and wrote to the juvenile judges.⁷⁷ She attempted to meet with the superintendent of one of the facilities, though she was prevented from doing so by staff.⁷⁸ She contacted the Deputy Department of Corrections Commissioner and the Governor.⁷⁹ Ultimately, because of her efforts, S.Z. was “unexpectedly released on order from the Governor’s office.”⁸⁰

70 Alexander S. v. Boyd, 876 F. Supp. 773, 790 (D.S.C. 1995); see also Anna Rapa, Comment, *One Brick Too Many: The Prison Litigation Reform Act as a Barrier to Legitimate Juvenile Lawsuits*, 23 T.M. COOLEY L. REV. 263, 279 (2006).

71 No. 1:04-CV-447, 2005 WL 1799538 (N.D. Ind. July 27, 2005).

72 *Id.* at *2.

73 *Id.* at *1.

74 *Id.*

75 *Id.* at *2.

76 *Id.* at *7.

77 *Id.* at *2.

78 *Id.*

79 *Id.* at *4.

80 *Id.* at *2.

Nonetheless, the district court dismissed the Minix family's federal claims under the PLRA's exhaustion rule because S.Z. had not himself filed a grievance in the juvenile facility.⁸¹ At the time, the Indiana juvenile grievance policy allowed incarcerated youths only two business days to file a grievance.⁸²

Only two months after S.Z.'s suit was dismissed, the Civil Rights Division of the U. S. Department of Justice concluded an investigation and confirmed that one of the Indiana facilities where S.Z. had been assaulted, the South Bend Juvenile Facility, "fail[ed] to adequately protect the juveniles in its care from harm," and violated the constitutional rights of juveniles in its custody.⁸³ The federal government further concluded that the grievance system that S.Z. was faulted for not using was "dysfunctional" and "contribute[d] to the State's failure to ensure a reasonably safe environment."⁸⁴

Incarcerated children and youths do not clog the courts with lawsuits, frivolous or otherwise. Though they are often incapable of complying with the tight deadlines and complex requirements of internal correctional grievance systems, their lack of capacity should not immunize abusive staff from the accountability that comes with court oversight. Those under eighteen do not file many lawsuits, and are not the source of any problem the PLRA is trying to solve. And they are particularly poorly positioned to deal with its limits. They should be exempted from its reach.

* * *

When federal courthouses are barred to constitutionally meritorious cases, the resulting harm is not merely to the affected prisoners but to our entire system of accountability that ensures that government officials comply with constitutional mandates. The erection of hurdles to accountability should not be seen as "reducing the burden" for correctional administrators—it should be recognized as weakening the rule of law. The PLRA must be amended.

⁸¹ *Id.* at *7.

⁸² *Id.* at *3. Epilogue: The Minix family re-filed in state court, where the suit avoided exhaustion analysis because S.Z. was no longer incarcerated; the defendants once again removed the case to federal court, and this time the suit was permitted to go forward. *Minix v. Pazera*, No. 3:06-CV-398, 2007 WL 4233455 (N.D. Ind. Nov. 28, 2007).

⁸³ Letter from Bradley J. Schlozman, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to Mitch Daniels, Governor of the State of Ind. 3 (Sept. 9, 2005), *available at* http://www.usdoj.gov/crt/split/documents/split_indiana_southbend_juv_findlet_9-9-05.pdf.

⁸⁴ *Id.* at 7.